a

**HONG LEONG FINANCE BHD**

**v.**

**TRAVERS DEVELOPMENT SDN BHD & ANOR**

b

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[WRIT NO: D7-22-1743-1999]
22 MARCH 2002

c ***CIVIL PROCEDURE:*** *Summary judgment - Delay in application - Whether delay a ground per se for defeating application - Whether defence a sham - Whether bona fide triable issues raised - Whether delay inordinate*

d ***CIVIL PROCEDURE:*** *Summary judgment - Time for application - Whether must be made before delivery of defence - Whether plaintiff must explain delay if application made after delivery of defence - Rules of the High Court 1980, O. 14 r. 1*

This was the defendants' appeal against the decision of the senior assistant registrar allowing final judgment to be entered summarily against them in an action by the plaintiff bank for the recovery of a RM20 million loan made to
e the defendants. The O. 14 judgment was sought and obtained on the ground that the defendants had no defence to the claim which necessitated a trial. The issues raised in the instant appeal were that: (i) the plaintiff had delayed in taking out the O. 14 application (after delivery of defence); (ii) the plaintiff had not given notice to the 2nd defendant on the variation in the interest rate;
f and (iii) the interest rate was varied without the consent of the 2nd defendant.

**Held:**

**[1]** The right of a plaintiff to enter final judgment summarily cannot be defeated solely on account of a delay in the O. 14 application if the
g defence is a sham or if it discloses no *bona fide* triable issues. (*Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424 CA followed.) Although the primary intention of O. 14 r. 1 Rules of the High Court 1980 ('RHC') may be that an application should be made before a defence has been delivered in the ordinary course, yet
h it is not in all cases compulsory. A plaintiff is not necessarily too late in making his application under O. 14 r. 1 RHC merely because a defence has been delivered. In any event, the filing of the present plaintiff's application for summary judgment 11 days after the delivery of the defence did not amount to an inordinate delay. (pp 709 g, 711 b & 713
i g-h)

**[2]** It was clear, upon the uncontroverted evidence, that notice of the variation in the interest rate had indeed been given by the plaintiff to the 2nd defendant. The latter was, therefore, aware of the said variation, and must have agreed to abide by it. (pp 713 i & 714 a-b, e)

*[Defendants' appeal dismissed.]*

**Case(s) referred to:**

*Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd [1969] 2 MLJ 98* ***(refd)***

*Jacobs v. Booth's Distillery Co [1901] 85 LT 262* ***(refd)***

*Krishnamurthy & Anor v. Malayan Finance Corp Bhd [1986] 1 CLJ 541; [1986] CLJ (Rep) 170* ***(refd)***

*McLardy v. Slateum [1980] 24 QBD 504* ***(refd)***

*Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609* ***(refd)***

*Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York [1998] 1 CLJ 424* ***(foll)***

*Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi [1978] 2 MLJ 267* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 14 rr. 1, 4(1), O. 18 r. 2(1), O. 19 r. 2(1), O. 56 r. 1

*For the defendants/appellants - Wong Rhen Yen; M/s Dennis Nick & Wong*
*For the plaintiff/respondent - Ng Sai Yeang; M/s Raja, Darryl & Loh*

*Reported by Gan Peng Chiang*

## JUDGMENT

**T Selventhiranathan J:**

This was an appeal by the defendants against the decision of the learned senior assistant registrar ('the registrar') allowing final judgment to be entered summarily in favour of the plaintiff upon the plaintiff's application therefor made under O. 14 ('the O. 14 application'). All references in this judgment to an order or a rule shall mean that order or that rule as it appears in the Rules of the High Court 1980 ('the Rules').

The plaintiff in this case granted a term loan facility to the first defendant in the sum of RM20 million upon terms and conditions agreed upon. In relation thereto, the first defendant *inter alia* executed a first party legal charge on six pieces of property belonging to it in favour of the plaintiff as security for the repayment of the loan. The second defendant guaranteed the repayment of all moneys becoming payable and owing by the first defendant to the plaintiff pursuant to the said terms and conditions.

The moneys under the loan were duly released and the first defendant defaulted in the repayment of the sum of RM2,762,629.85 constituting arrears of instalments, interest on the arrears and other charges in respect of the loan, as shown in the separate notices of demand dated 7 May 1999 issued to the defendants. Consequently, the plaintiff recalled the whole facility *vide* further separate notices of demand to the defendants dated 18 May 1999 when they failed to respond to the earlier notices of demand. Upon such recall of the whole facility, the amount of RM22,878,092.83 became allegedly owing and due to be paid by the first defendant, as borrower, and by the second defendant, as guarantor of the facility, to the plaintiff.

The plaintiff then filed its O. 14 application on 20 December 1999 *vide* encl. (7) to enter final judgment against the defendants on the ground that they had no defence to the plaintiff's claim and that there was no reason why there ought to be a trial of that claim.

On 23 May 2000, the registrar entered final judgment against the defendants in terms of the O. 14 application in encl. (7). The defendants then appealed against that judgment to the judge in chambers pursuant to O. 56 r. 1 *vide* notice of appeal herein as per encl. (13). At the hearing of this appeal, essentially three issues were submitted for the consideration of this court by the learned counsel for the defendants.

The first issue raised was that the plaintiff had delayed in taking out its O. 14 application. The second and first defendants had entered appearance on 26 November 1999 and 7 December 1999 respectively and then had filed their joint defence on 9 December 1999. It was only on 20 December 1999 that the plaintiff took out its O. 14 application for final judgment. It was therefore the contention of the defendants that the plaintiff had failed to explain or account as to why its O. 14 application had been taken out only after the delivery of the defence. In the circumstances, it was urged that the application ought to be dismissed with costs.

However, it is pertinent to note that in paras. 9 and 10 of the affidavit at encl. (6) of one Ong Toon Luang, the manager of the main branch of the plaintiff, affirmed on 14 December 1999 in support of the O. 14 application, the deponent had explained the chronology of events leading to the filing of the O. 14 application as follows:

> 9. Saya telah mengarahkan peguamcara plaintif untuk memfailkan permohonan ini terhadap defendan kedua berikutan penyerahan writ saman di dalam tindakan ini ke atas peguamcara defendan kedua pada 18.11.1999 dan penyerahan memorandum kehadiran kepada peguamcara plaintif pada 26.11.1999.

10. Kemudiannya atas permintaan peguamcara defendan kedua untuk menyerah satu salinan lagi writ saman di dalam ini, saya juga telah mengarahkan peguamcara plaintif untuk memfailkan permohonan ini terhadap defendan pertama berikutan penyerahan writ saman di dalam tindakan ini ke atas peguamcara defendan pertama pada 1.12.1999 dan penyerahan memorandum kehadiran kepada peguamcara plaintif pada 8.12.1999.

These averments of fact on behalf of the plaintiff were not controverted in any way by the defendants in their affidavits. It therefore became abundantly clear that instructions were given by the first and second defendants at different times to their solicitors to accept service of the writ on their behalf. It became further clear that although the second defendant entered his appearance in the action on 26 November 1999, his solicitors, who also were and are the solicitors for the first defendant, chose to file his defence jointly with that of the first defendant on the thirteenth day after the second defendant had entered appearance, ie just one day short of the fourteen days he is allowed by O. 18 r. 2(1) to file and serve his defence, failing which he would have been in default of defence pursuant to O. 19 r. 2(1), which in turn would have entitled the plaintiff to enter final judgment against him without further ado and then to proceed with the action against the first defendant.

To my mind, the solicitors for the defendants resorted to an adroit technical manoeuvre by first entering appearance for the second defendant on the last day permitted by the Rules for doing the same, the solicitors having been served with the writ of summons with the statement of claim endorsed thereon on 18 November 1999 and then entering appearance for the second defendant eight days later on 26 November 1999. The memorandum of appearance of the first defendant was filed on 7 December 1999 and served on the solicitors for the plaintiff on 8 December 1999. Their joint defence was filed on 9 December 1999. If at all there was any delay, it was only a delay of about eleven days from the filing of the joint defence to the filing of the O. 14 application on 20 December 1999. To my mind, this did not constitute inordinate delay meriting explanation beyond what was stated in the said paras. 9 and 10 of the plaintiff's affidavit, particularly in the circumstances of the striking paucity of any evidence from the defendants denying this.

The purported delay on the part of a plaintiff in taking out an O. 14 application has been raised constantly in the High Court by a defendant seeking to thwart the application. In the light of such approach and argument, it would be a useful exercise in the appreciation of first principles to revisit a decision of the Court of Appeal to remind one of the procedural law applicable. Hence, in the case of *Perkapalan Shamelin Jaya Sdn Bhd & Anor v. Alpine Bulk Transport New York* [1998] 1 CLJ 424, his lordship Gopal Sri Ram JCA did

consider the similar issue of delay which had been raised in that case and elaborated most aptly thereon as follows at pp. 428-429 of the report of that case:

> In support of the delay argument, the appellants relied upon the decision of this court in *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609. It was submitted by counsel that that case is authority for the proposition that a plaintiff's summons for summary judgment may be defeated solely upon the ground of delay in making the application. With respect, we are unable to accede to the submission made by the counsel for the appellants.
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> In *Ng Hee Thoong*, this court reversed the High Court and granted leave to defend principally on the ground that the issue whether a valid demand had been made of the defendants in that case was plainly arguable. This court also took into account the fact that the plaintiff in that case had remained inactive for more than a year and then moved for summary judgment without giving notice of intention to proceed under the relevant provision of the RHC (meaning the Rules of the High Court 1980). When properly understood, there is nothing in *Ng Hee Thoong*'s case to suggest that an application for summary judgment may be defeated solely on the ground that there has been a delay in moving the court. Such a proposition runs counter to the interests of justice. For delay can surely provide no answer to an application made under O. 14 where there are no *bona fide* triable issues. We therefore take this opportunity to declare the absence of the proposition contended for by counsel.
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> In our judgment, authority that is plainly against the appellants concludes the point taken by counsel. We have in mind, of course, the judgment of Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98. His Lordship, in granting a summons for judgment taken out about three months after appearance had been entered to the writ, applied the following passage in the judgment of Baron Pollock in *McLardy v. Slateum* [1980] 24 QBD 504 at p. 506:
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> > The view taken by other judges, and by the masters, is that the intention of O. 14 r. 1 was that the plaintiff should apply within a reasonable time after the appearance of the defendant, but that it very often happens that a defence, which has been delivered, itself discloses facts which make an application under O. 14 right and proper. We think that this is the proper construction of the rule ... . **Although the primary intention of the rule may be that an application should be made before defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory.** Therefore, our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O. 14 r. 1 because a defence has been delivered ... If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case. (emphasis added)

I have also given added emphasis to the thrust of his lordship Gopal Sri Ram JCA's exposition on the argument of delay in the above excerpt from the decision of the Court of Appeal in *Perkapalan Shamelin Jaya Sdn Bhd (supra)* to show that delay by itself cannot operate to defeat the just right of the plaintiff to final judgment summarily under O. 14 where the defence is a sham or where it raises no *bona fide* triable issues. As Baron Pollock stated in *McLardy v. Slateum (supra)* in the passage quoted with approval by Raja Azlan Shah J (as His Highness then was) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd (supra)* "... it very often happens that a defence, which has been delivered, itself discloses facts which make an application under O. 14 right and proper". This would certainly be applicable to a case where the defence is a sham or where it does not raise any *bona fide* triable issue.

On the same issue of delay on the part of a plaintiff in making an O. 14 application, his lordship NH Chan JCA (as he then was) expanded upon the applicable provisions of O. 14 thus at p. 430 of the report of *Perkapalan Shamelin Jaya Sdn Bhd (supra).*

> I agree completely with my lord Gopal Sri Ram JCA that the appeal should be dismissed for the reasons which he has so ably put in his unexceptionable judgment. I wish only to say a few words in support of and to amplify on what my lord has said.
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> In *McLardy v. Slateum* [1890] 24 QBD 504, Pollock B held at p. 506 that:
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> > Although the primary intention of the rule (O. 14 r. 1) may be that an application should be made before a defence has been delivered in the ordinary course, yet we think that it is not in all cases compulsory. Therefore, our judgment upon this point of law and practice is that a plaintiff is not necessarily too late in making his application under O. 14 r. 1 because a defence has been delivered.
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> An application for leave to sign judgment under O. 14 r. 1 need not necessarily be made before the defendant has delivered his defence. In *McLardy v. Slateum*, the plaintiff was successful in obtaining judgment under O. 14 a month after the defence was served. But, if a defence has been served, it may be sufficient to enable a defendant to get leave to defend. See O. 14 r. 4(1) which reads:
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> > A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the court. (emphasis added)
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> A defendant may show cause by 'affidavit or otherwise' and the term 'or otherwise' allows the defendant to do so by delivering a defence. But leave to defend the action will not be granted by the court if the defence is a

sham or it discloses no real defence. The court has to be satisfied that there is a triable issue or question or that there ought to be a trial. See *The Supreme Court Practice* [1997] Vol 1 at p. 157 para. 14/3-4/3.

Delay in applying for O. 14 is no ground for defeating the plaintiff's right to summary judgment under O. 14 when there is no real defence disclosed. 'If the plaintiff is precluded from the application for summary judgment, it would only mean unnecessary prolongment (*sic* – I think the word is 'prolongation) of the case, resulting in a waste of time and added expense for the defendant company', said Raja Azlan Shah J (as he then was) in *Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 at p. 100. He then referred to this passage by Halsbury LC in *Jacobs v. Booth's Distillery Co* [1901] 85 LT 262 (HL):

> ... There are some things too plain for argument; and where there were pleas put in simply for the purpose of delay, which only added to the expense, and where it had not been in aid of justice that such things should continue, O. 14 was intended to put an end to that state of things, and to prevent sham defences from defeating the rights of the parties by delay, and at the same time causing great loss to plaintiff's who were endeavouring to enforce their rights.

I regret to have to say that the dictum of Pollock B had been given unnecessary and excessive prominence by the late Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267 at p. 268, where he said thus:

> The writ in these proceedings was issued on 8 July 1977, and served on 29 July on the defendants who filed their defence and counterclaim on 12 August raising several points of defence and counterclaim, but the plaintiffs only took out their application for summary judgment for the full amount of their claim on 16 August. In *McLardy v. Slateum* [1890] 24 QBD 504, the Divisional Court held that, though it was the intention of the rules that the application should be made before a defence had been delivered in ordinary course, the plaintiff was not precluded from making it afterwards, **but that in such an event the onus is cast on the plaintiff of showing why he did not apply sooner**. The plaintiffs in this case have not discharged this onus and indeed counsel appearing for them admitted this to be so. (emphasis added)

And this is what Pollock B actually said in *McLardy v. Slateum* at pp. 506, 507:

> If a plaintiff makes his application after the ordinary time, the onus is on him to shew that the delay is justifiable under the special circumstances of the case.

There is nothing in the wording of O. 14 r. 1 to warrant such a construction. In fact, in that case, there was no explanation given by the plaintiff for the delay in applying for O. 14, yet, he succeeded in obtaining judgment under the rule.

The dictum was given added credibility when it was approved by Salleh Abas LP in the Supreme Court case of *Krishnamurthy and Another v. Malayan Finance Corp Bhd* [1986] 2 MLJ 134 where he said (at p. 135):

> ... the law as to the time when an application for an O. 14 judgment should be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of the defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court, no O. 14 judgment could be signed. This is the *ratio decidendi* in *McLardy v. Slateum* [1890] 24 QBD 504. This case was followed by Raja Azlan Shah J (as he then was) in Comptroller-General of *Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98 and Abdoolcader J (as he then was) in *Societe des Etains de Bayas Tudjuh v. Woh Heng Mining Kongsi* [1978] 2 MLJ 267. (emphasis added)

Fortunately, the words of the former Lord President were only dicta as 'no defence was ever filed by the appellants and other defendants' (at p. 135) in that case, and the plaintiff (respondent) was successful in obtaining summary judgment against the appellants (defendants) whose appeals were dismissed by the Supreme Court.

I was in agreement with NH Chan JCA that the above-quoted passage from the judgment of the Supreme Court in *Krishnamurthy (supra)* was only *obiter dicta* in the circumstances of that case and therefore not judicial precedent which I was bound to follow, applying the principle of stare decisis. Ergo, I was free to decide the present case independently of *Krishnamurthy (supra)*.

Having regard to the foregoing, it was clearly incumbent upon this court to look into the merits of the defendants' case. In the event no real defence was disclosed, ie the defence did not raise any *bona fide* triable issue, or if the defence was altogether a sham, any delay on the part of the plaintiff in taking out the O. 14 application, having regard to the facts of the case, could not operate as a bar to final judgment being entered summarily against the defendants, leave alone the explained and reasonably short period of the so-called delay of about eleven days which obtained in the present case.

The court therefore had to consider the second purported triable issue raised by the defendants. The learned counsel for the defendants urged the court to find that no notice of the variation of the interest rate was given by the plaintiff to the second defendant. However, it was the view of this court that

the said allegation was clearly unsustainable and went against the grain of the available evidence because a letter dated 27 February 1998 annexed to the affidavit of Ong Toon Luang affirmed on 14 December 1999 clearly provided for a variation of the interest rate. It must be emphasised that there was no dispute that the signatory confirming the acceptance of the terms of that letter on behalf of the first defendant was the second defendant in his capacity as a director of the first defendant, and it verges on the incredulous to suggest that the second defendant had no notice of such variation. The bare denial of another director of the first defendant, one Goh Hock Chuan, at para. 6 of his affidavit at encl. (8) that "... the defendants were not informed nor notified of any variation or change of interest rate by the plaintiff" flies in the face of the positive assertions on behalf of the plaintiff in the affidavit at encl. (11) with regard to the documentary exhibits, which assertions were not effectively controverted.

According to the learned counsel for the defendants, the sustainability of the third purported triable issue raised hinged on the outcome of the conclusion to be drawn in respect of the second purported triable issue. In view of the overwhelming evidence that the second defendant not only knew of the variation in the interest rate but also agreed to abide by the said variation, there was no necessity for the court to consider the third purported triable issue, namely, that the interest rate was varied without the consent of the second defendant and that he was consequentially discharged from liability as the guarantor of the term loan facility granted to the first defendant by the plaintiff.

In addition to these purported triable issues which were pleaded in the alternative, the defence as filed at encl. (5) was a series of bare denials of the plaintiff's positive assertions of fact in the statement of claim, and put the plaintiff to strict proof of virtually all its averments without condescending to particulars in disputing those averments. To my mind, the defence at encl. (5) was a complete sham or at best it raised purported triable issues in concert with the defendants' affidavits which, however, upon analysis were stripped of any semblance of legitimacy to be a viable defence entitling the defendants to a trial of the action.

For the foregoing reasons, the appeal of the defendants in encl. (13) was dismissed with costs and the decision of the registrar in respect of the plaintiff's O. 14 application was confirmed.